84-825

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.

Petitioner,

v.

MARY P. LAFFEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Should the Court resolve the split in the circuits over whether discriminatory intent is the ultimate issue in "equal-pay-for-equal-work" cases under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, as interpreted in *County of Washington v. Gunther*, 452 U.S. 161 (1981); and if so, did the court below again disregard this Court's test for "disparate treatment" by holding that "discriminatory motive or animus" was "not even relevant" here?

2. In calculating the award of backpay on "equal-pay-for-equal-work" claims under Title VII of the Civil Rights Act, are the courts required to apply the "upward equalization" provision of the Equal Pay Act rather than the measure that this Court has held applies in Title VII cases: the difference between the actual wage rate paid and the rate that would have been paid in the absence of the alleged discrimination?

3. Should the Court resolve the conflict among the circuits over the proper test for determining when a violation of the Fair Labor Standards Act, including the Equal Pay Act, is "willful," a question closely related to the "willfulness" issue under the Age Discrimination in Employment Act now before the Court in *TWA v. Thurston*, No. 83-997?

4. In determining whether an employer need not pay double damages under the Fair Labor Standards Act because he acted in "good faith' and with "reasonable grounds" in concluding that an employment practice was lawful, is it completely irrelevant as a matter of law that the practice had industry-wide acceptance and was approved in *bona fide* collective bargaining agreements?

CORPORATE LISTING STATEMENT

Petitioner Northwest Airlines, Inc. is a wholly-owned subsidiary of NWA, Inc. Northwest Airlines, Inc. holds through a wholly-owned subsidiary twenty-five percent (25%) of the shares of Gatwick Handling Limited. Northwest Airlines, Inc. has no other affiliates. All other subsidiaries of Northwest Airlines, Inc. and NWA, Inc. are wholly owned.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Northwest Airlines, Inc., defendant in the district court, was the appellant/cross-appellee in the court of appeals.

The plaintiffs in the district court were the appellees/cross-appellants in the court of appeals. The named plaintiffs are:

Mary Pat Laffey
M. Louise Ayres
Diane B. Backovich
Nancy J. Bates
Goldie K. Chun
Rhea Dow
Beverly A. Emge
Susan F. Gerde
Mary Patricia Gleeson
Dona M. Hall
Viona S. Hamilton
Peggy M. Helme
Judi Jochimsen
Celestine Johnson
Katherine T. Keane
Suzanne P. Dress
Margaret J. Laffey
Abby Lanman
Shirley Linburgh
Barbara E. Manrow
Alice C. McCabe
Patricia McFarland
Mary C. Moxness
Myrna Lee Olson
Janet M. Pegg
Susan M. Pupera
Carol Raschke
Angelica H. Renner
Virginia Rose
Marygale Rosenberg
Rosemary M. Ruff
Mary Ann Schaak
Georgia Simpson
Alta Mae Smith
Iris Lynn Smith
Janet P. Smith
Jimene K. Smith
Elizabeth Stewart
Gayle Sturgis
Connie Walker

The above named plaintiffs have acted as class representatives for two subclasses of plaintiffs, an "Equal Pay Act class," consisting of approximately 960 women who filed consents with the district court, and a "Title VII class," consisting of other present or former Northwest female cabin attendants who did not elect to be excluded from this lawsuit.

The Equal Employment Opportunity Commission and the Secretary of Labor of the United States participated as *amici curiae* at earlier stages of the proceedings in the court of appeals.

Air Line Pilots Association, a non-aligned party below, and Transport Workers Union participated in earlier stages of the proceedings in the court of appeals.

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MARY P. LAFFEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northwest Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 20, 1984.

OPINIONS BELOW

The pertinent opinions of the court of appeals are the opinion on the appeal from the final judgment, 740 F.2d 1071 (1984) ("*Laffey III*"), and the opinion on an interlocutory appeal, 567 F.2d 429 (1976) ("*Laffey I*"), *cert. denied*, 424 U.S. 1096 (1978).[1] The pertinent opinions of the district

[1] Three other opinions by the court of appeals are not directly pertinent: 587 F.2d 1223 (1978), denying taxation of costs; 642 F.2d 578 (1980) ("*Laffey II*"), concerning modification of certain injunctive provisions; and the opinion of September 28, 1984 (D.C. Cir. No. 83-1838), not yet reported, reversing the award of attorney's fees to plaintiffs' counsel.

court are reported at 366 F. Supp. 763 (1973), *as amended by* 8 EPD ¶ 9528 (1974) (findings and conclusions); 374 F. Supp. 1382 (1974) (denying liquidated damages; entering remedial order); 16 EPD ¶ 8317 (1978) (remedial issues); 481 F. Supp. 199 (1979) (backpay issues); 24 EPD ¶ 31,384 (1980) (awarding liquidated damages). Copies of these opinions and of relevant unpublished orders are reprinted in a separate Appendix ("App.").

JURISDICTION

The judgment of the court of appeals (App. 289a) was entered on July 20, 1984. A timely petition for rehearing was denied on August 28, 1984 (App. 291a). The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). In reviewing appeals from final judgments, the Court regularly has "consider[ed] questions raised on the first [interlocutory] appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *see, e.g., Spaziano v. Florida*, 104 S. Ct. 3154 (1984); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Falk v. Brennan*, 414 U.S. 190 (1973); *Hughes Tool Co. v. TWA*, 409 U.S. 363 (1973).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Equal Pay Act of 1963, 29 U.S.C. § 206(d); the Fair Labor Standards Act, 29 U.S.C. §§ 216(b), 251(a), 251(b), 255(a), 260; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-5(g), are set forth in the separate Appendix to this Petition (App. Q).

STATEMENT

1. **Introduction.** This case involves a backpay award to about 3,300 women. With interest, the award totals approximately $60 million. It may be the largest judgment ever

rendered under the Equal Pay Act or Title VII of the Civil Rights Act. Under the decision below, Northwest Airlines must retroactively pay *all* stewardesses the higher wages previously established by collective bargaining for only seven percent of its cabin attendants, who were believed to be performing substantially more demanding jobs. Ironically, as a result of the rulings below, stewardesses would receive retroactive awards that would pay them substantially *more* than hundreds of their male counterparts received for performing the same work.

Until January 1976, Northwest employed two classifications of cabin attendants, "pursers" (most of whom were men) and basic cabin attendants (men and women). Pursers were assigned primarily to international flights and had supervisory authority over all other cabin attendants. They were paid 20% to 50% more in base pay than other cabin attendants. App. 166a-167a, 211a, 215a; *Laffey III* R. 144 App. B. Only about 150 of Northwest's cabin attendants were pursers. The rest, as many as 2,000 men and women at one time, occupied the basic cabin attendant position. Most basic cabin attendants were stewardesses, but beginning in 1949 and continuing with minor interruptions through the backpay period (1968-1978), Northwest also employed a significant number of men in the basic cabin attendant job. As the trial judge found, those men performed "the same duties as stewardesses" and were "compensated at the same rate." App. 169a; *see* App. 166a, 167a; *Laffey III* R. 144 App. A. The wage levels for all cabin attendants were established and adjusted regularly in collective bargaining with unions in which the stewardesses "always have and still do possess a clear numerical superiority . . ." App. 165a.

Until the late 1960's, only men were eligible to be promoted to purser. In 1970, a group of stewardesses brought this case, alleging that the former ineligibility of women to be promoted to fill the occasional purser vacancies

violated Title VII of the Civil Rights Act. They also alleged that *all* stewardesses, in any event, were entitled to the same pay as pursers because the jobs were "equal" within the meaning of the Equal Pay Act. Northwest does not challenge the claim that the pre-1970 exclusion from *promotional* eligibility violated Title VII. What Northwest does challenge is the holding that the *pay differential* between pursers and basic cabin attendants constituted discrimination "on the basis of sex," despite the trial judge's finding that the differential reflected Northwest's actual understanding that the purser position was materially different from the basic cabin attendant position and merited higher pay than earned by the women *and men* in the basic job.

2. **The Purser Position.** The position of "flight purser," which had its genesis in the maritime tradition, was first established in 1947, when Northwest began international flights. App. 163a, 166a-167a; *Laffey I* Jt. App. 343. Northwest's creation of this position followed the lead of the two established international carriers, Pan American and TWA. *See Maguire v. TWA*, 535 F. Supp. 1283, 1288 (S.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 728 (2d Cir. 1983) (holding that TWA's copying of Pan Am's purser position indicated that the pay differential was job-related, not sex-based, even though TWA hired only male pursers).

Like the traditional pursers on ocean-going passenger vessels, Northwest's pursers were regarded as junior officers charged with overall supervisory responsibility for assuring passenger comfort and well-being. The job definition contained in every collective bargaining agreement provided that pursers "may be designated as being in charge of other cabin attendants." App. 166a-167a. The definition of the roles of the basic cabin attendants did not include any supervisory responsibilities. App. 166a, 167a; *Laffey I* Jt. App. 2563. Reflecting this settled understanding shared by Northwest and its cabin attendants, North-

west's "Cabin Service Manual," the basic rulebook for all cabin attendants, established a chain of command in which a purser, regardless of seniority, was automatically in overall charge of all basic cabin attendants on the flight. App. 208a.

On any Northwest flight to which a single purser was assigned, the purser *always* exercised overall supervisory responsibility over all *other* cabin attendants. The trial judge found that the supervisory cabin attendant exercised real and continuing responsibilities for directing workload and functions, that they were "subject to discipline if they fail to carry out their 'supervisory' responsibilities," and that they were held "accountable" for failing to carry out these responsibilities. App. 209a.

On domestic passenger flights, which did not carry pursers, the basic cabin attendant with seniority would have to assume some supervisory responsibilities, but a stewardess (or her male counterpart) *never* supervised a purser. App. 208a. Moreover, as the trial judge found, the cabin attendant who assumed a temporary supervisory role was, unlike a purser, "accountable only for the conduct of service in that section of the aircraft in which he or she works. ..." App. 208a. Since cabin attendants bid for flights on the basis of seniority, the cabin attendants on a particular flight tended to be of roughly equal seniority. As a result, the identity of the senior stewardess on a particular flight was a matter of chance. Trial Tr. 848-51, 874, 938-39, 1275-76. In addition, since more than 90% of Northwest cabin attendants were non-pursers, a particular cabin attendant in the basic job only had random and sporadic opportunities to supervise, and could only supervise his or her peers.

3. **The Determination of Job Equality.** Northwest acknowledged below that the custom of restricting purser positions to men was inconsistent with Title VII. That

practice was changed by a 1967 amendment to the collective bargaining contract, and a number of stewardesses were actually promoted to the higher paying job while the case was pending in the trial court. The plaintiffs, nevertheless, pressed the trial judge to rule that the job to which stewardesses had been ineligible for *promotion* was actually "equal" in "skill, effort and responsibility," within the meaning of the Equal Pay Act, to the job they all already held.

The courts below ruled that they could justifiably overlook the district judge's findings that the pursers' supervisory responsibilities had real content, because the trial judge had made a separate finding that the pursers' supervisory functions "require no greater skill, effort or responsibility, *than the other functions* assigned to all cabin attendants." App. 210a-211a (emphasis added). The courts, relying on that comparison of the various job components, concluded that the jobs here were "substantially equal" because the similarities outweighed the differences. Since most pursers (though not all) were men, the trial judge decided that the vast majority of basic cabin attendants—all except the *men* in that job—were entitled automatically to the higher pay that had been regularly negotiated in collective bargaining as appropriate only for the relatively small number of pursers.

4. **Motive for the Purser Pay Differential.** The district judge never made a finding of fact that Northwest paid pursers more than other cabin attendants *because* they were men. Rather, the judge's findings established that Northwest paid pursers more because of a well-settled understanding, reflected in *bona fide* negotiated labor agreements, that pursers held a different, more responsible position. For instance, the trial judge found that, even though he had concluded that the jobs were "in fact equal," Northwest had actually "believed otherwise," and "it was not unreasonable" to do so. App. 220a. Foreclosing any claim that the Company's explanation was merely "pretextual," the judge further found that Northwest believed

in "good faith" that it was not violating the Equal Pay Act by paying different wages for the two jobs and that there was no "intentional, bad faith, attempt to evade the law." *Id.; see also* App. 180a-181a.

On remand after *Laffey I*, the judge also found that Northwest's labor relations counsel and personnel officials had specifically reviewed the pay differential in light of the passage of the Equal Pay Act and Title VII and had "concluded that the jobs of purser and stewardess were *in fact* different." App. 253a (emphasis in original). The judge found that Northwest, on the basis of subsequent opinions of outside counsel and an independent personnel consultant, "adhered to its belief that the purser and stewardess positions were different throughout the litigation." *Id.* The court of appeals has never suggested that any of those findings was clearly erroneous.

Both the district judge and the court of appeals, however, held that motive is legally irrelevant solely because plaintiffs showed that the jobs were "substantially equal" as an objective matter and that most of the people in the higher paid job were men. *See* App. 103a. In *Laffey III*, the court of appeals added that, because women in the past had been excluded from *promotion* to purser, the absence of any "discriminatory motive" in setting wage rates was "not even relevant" in determining whether the pay differential itself also violated both Title VII and the Equal Pay Act. App. 14a-15a.

5. **The Measure of Title VII Backpay.** During the backpay calculation proceedings on remand following *Laffey I*, Northwest tendered evidence that, if the Company had realized that the jobs of purser and basic cabin attendant were legally "equal," it would have merged the classifications and set the pay scale for the merged classification lower than the premium pay that the small group of pursers had been thought to merit. That is in fact what happened in 1976 in the first collective bargaining agreement

negotiated after the district court's decision. Northwest offered evidence showing that the pay levels at other major airlines with only a single classification of cabin attendant were substantially below the purser rate paid by Northwest. *Laffey III* J.R.E. 139-53. The district court summarily rejected that evidence in the belief that the measure of backpay under Title VII must be the full pay differential, because that is the measure of recovery expressly specified in the Equal Pay Act. App. 247a, 239a. The court of appeals affirmed. App. 29a-34a.

6. **"Willfulness."** The courts below also found the Equal Pay Act violation "willful," thus establishing the backpay period as three years rather than two. *See* 29 U.S.C. § 255(a). Although Company officials had concluded that the differential was lawful, the court of appeals in *Laffey I* decided that an employer's violation of the Act is "willful" whenever he "is cognizant of an appreciable possibility that he may be subject to the statutory requirements" and he "consciously and voluntarily charts a course which turns out to be wrong." App. 122a-123a. The court adhered to this test in *Laffey III*. App. 28a.

7. **Liquidated Damages.** The trial judge initially found that Northwest had acted in "good faith" and with "reasonable grounds" in concluding that the pay differential comported with the Equal Pay Act and, thus, that statutory double damages ("liquidated damages") were not warranted. *See* 29 U.S.C. §§ 216(b), 260. The "reasonable grounds" for the Company's assessment were found to be:

> "the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point." App. 220a-221a.

In *Laffey I*, however, the court of appeals rejected as legally irrelevant all the factors cited by the district court except legal uncertainty. In addition, the court created a new test for subjective "good faith": the "legal uncertainty ... must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice." App. 132a.

On remand, the district judge found that Northwest's personnel officials and labor relations counsel had actually reviewed the job classifications in light of the Equal Pay Act and Title VII and had actually concluded that the jobs were in fact different and could be compensated at different levels. Nevertheless, the judge ruled that Northwest officials had not gone far enough in their analysis to satisfy *Laffey I*'s restrictive standard of "good faith" and "reasonable grounds." Accordingly, the judge believed that he had to assess double damages on the Equal Pay Act claims. App. 255a-256a. In *Laffey III*, the court of appeals affirmed. App. 46a.

REASONS FOR GRANTING THE WRIT

In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), this Court held that, even if it would be "unfair to require" Northwest "to pay the entire judgment" in this case, Northwest had no statutory claim for "contribution" against the unions who joined in fashioning and evaluating the purser/stewardess pay differential and who, indeed, successfully demanded that Northwest maintain and even enlarge the differential after this suit was filed. The issue now confronting the Court is whether the backpay judgment itself rests on legally erroneous premises.

I. THE RELEVANCE OF INTENT

Under the Equal Pay Act an employer is forbidden to "discriminate ... on the basis of sex" in paying for equal work, but is not liable for a wage differential "based on any

other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). The "Bennett Amendment" to Title VII, 42 U.S.C. § 2000e-2(h), applies this defense to Title VII cases. The court below ruled that this defense permits an employer only to rely on an "objective standard," such as a formal job evaluation, to justify the conclusion that jobs deserve different pay. The court held that an employer's actual motivation in paying different wages is irrelevant. That ruling conflicts with this Court's decision in *County of Washington v. Gunther*, 452 U.S. 161 (1981). The ruling below also conflicts with decisions of other courts of appeals.

A. The "Bennett Amendment" to Title VII provides that any employment practice "authorized" under the Equal Pay Act is also lawful under Title VII. This Court in *Gunther* rejected the argument that, because of the Bennett Amendment, Title VII covers sex discrimination claims involving wages only when the jobs are "equal" and, thus, when the differential could also be attacked under the Equal Pay Act. In response to the dissent's contention that this construction would render the Bennett Amendment "mere surplusage," the Court explained that incorporation into Title VII of the fourth Equal Pay Act "defense"—which provides a defense to an employer who relied on a "factor other than sex"—was "significant" for another reason. The Amendment "clarified that the standards of the Equal Pay Act would govern even those wage discrimination cases where only Title VII would otherwise apply." 452 U.S. at 175. The Court left no doubt that the effect of this limitation was to confine claims alleging unequal pay for equal work to cases of *intentional* discrimination:

> "Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.' *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however,

> was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination." 452 U.S. at 170.

In *Griggs*, the Court had held that, in some cases under Title VII, a plaintiff can prevail by showing "disparate impact," without showing an actual intent to discriminate. The Court's ruling in *Gunther*—that the Equal Pay Act's fourth defense precludes the use of the *Griggs* "disparate impact" standard—means that, in equal pay cases, discriminatory intent is the ultimate issue. The Court expressly stated that the purpose of the sex-discrimination statutes was to outlaw discimination against women "because of their sex" and thus to combat "disparate treatment of men and women." 452 U.S. at 180. The Court in *Gunther* expressly anticipated that its reading of the importance of the "factor other than sex" provision would "affect the outcome" of some "sex-based wage discrimination cases . . ." *Id.* at 175 n.14. The reason is that when "disparate treatment" —discriminatory intent—is at issue, the ultimate question is the employer's "actual motive." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982).

At least two circuits have recognized that, in light of *Gunther*, discriminatory intent is the ultimate issue in any equal pay case. For example, in *Maxwell v. City of Tucson*, 34 EPD ¶ 34,518 (9th Cir. 1984), the Ninth Circuit ruled that any showing that the employer relied on some purpose other than sex in establishing a pay differential would establish the "factor other than sex" defense. Judge Merrill, resting on *Gunther* and the legislative history of the Equal Pay Act, concluded in a concurring opinion that, when an employer invokes the "factor other than sex" provision to justify payment of a wage differential, it "is, then, with the motivation that prompted that action that we are concerned." 34 EPD at 34,290. Judge Merrill explained that this provision was "designed to permit employers to defend wage differentials on the showing that such differentials are not

predicated on sex discrimination." *Id.* Similarly, in *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1137 (5th Cir. 1983), the court held that a "classic equal pay claim" under the Equal Pay Act and Title VII is a "disparate treatment suit" in which the ultimate inquiry is whether "a discriminatory reason more likely motivated the employer" in paying the differential. Several commentators also have observed that *Gunther* establishes intent as an essential element in equal pay cases.[2]

By contrast, the Tenth Circuit recently held in *Sinclair v. Automobile Club of Oklahoma*, 733 F.2d 726, 729 (10th Cir. 1984), without discussing *Gunther*, that "[d]iscriminatory intent is not an element of a claim" under the Equal Pay Act. More importantly, the court below decided that, despite *Gunther*, the employer's intent is irrelevant in an equal pay case. Instead, the court decided that the "factor other than sex" defense encompasses only a "sex-neutral, objective standard" such as an "objective job rating system." App. 12a. Although in *Corning Glass Works v. Brennan*, 417 U.S. 188, 200-01 (1974), this Court held that a differential resulting from a unilateral job evaluation system is

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[2] *See, e.g.*, Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. Col. L. Rev. 1, 66 (1981) ("The critical thrust of Justice Brennan's opinion was that the *Griggs* theory of liability, *i.e.*, no intent necessary for a violation, could not be used in sex-based wage discrimination cases under either Title VII or the Equal Pay Act."); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 846 (1982) (same); Powers & Cooper, *Validity of Comparable Worth Left Open By "Gunther"*, Legal Times of Washington, June 15, 1981, at 15, 18 (referring to "subtle indications in the opinion that intent is a critical and necessary element of any Title VII claim that alleges discrimination in compensation"). *See also* Note, *Gender-Based Wage Discrimination and the Bennett Amendment: County of Washington v. Gunther*, 1982 B.Y.U. L. Rev. 401, 407-12 (arguing in favor of permitting disparate-impact wage claims while recognizing that *Gunther* "suggests that the impact theory will not be available to plaintiffs in gender-based wage discrimination litigation").

automatically permissible under the Act—because Congress was only seeking to attack "wage differences based on sex alone"—the Court never suggested that a differential that emerges from bilateral, *bona fide* collective bargaining and that corresponds with the employer's own actual assessment of job differences should have *less* protection. Moreover, as the court below recognized, other courts, including the Fifth Circuit in *Plemer*, have not limited the "factor other than sex" defense to "objective" job evaluation systems. App. 12a n.8. *See, e.g., Campbell v. Von Hoffman Press, Inc.*, 632 F.2d 69 (8th Cir. 1980); *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973).[3]

B. The court below also held that, if *Gunther* does require a showing of discriminatory intent—"disparate treatment"—in equal pay cases, plaintiffs would still recover. This conclusion rests on the theory that the existence of "sex-segregated job classifications and unequal pay for equal work" automatically creates "equal pay" liability,

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[3] The court below also refused to follow *Gunther* on the ground that an intent requirement would not be "synchronous" (App. 10a) with the provision in the Fair Labor Standards Act (of which the Equal Pay Act is a part) that grants a court discretion to waive double damages if the employer shows that he acted "in good faith" and had "reasonable grounds for believing" that no violation occurred. 29 U.S.C. § 260. That provision, however, was enacted in 1947, sixteen years before the Equal Pay Act, in order to relieve employers from the doubling of liability for unanticipated violations of the minimum wage and maximum hour provisions of the FLSA, a statute that imposes liability without regard to intent. The equal pay bill had been debated as a free-standing anti-discrimination measure. In the final stages of congressional consideration of the bill in 1963, Congress tucked it into the FLSA, which the Labor Department administered, for the sole purpose of neutralizing objections that enforcement of the new law would otherwise have led to creation of a "new bureaucracy" and a "new set of investigators." 109 Cong. Rec. 7223, 9193 (1963) (remarks of Reps. Thompson and Bolton). There was no hint that the 1947 amendment dealing with relief from double damages would somehow control the standards for equal pay liability under the new anti-discrimination statute.

regardless of the employer's reason for establishing the pay differential. In these circumstances, according to the court,

> "an employer's 'discriminatory motive,' ... far from ranking as an 'essential element of a plaintiff's claim ... is not even relevant ..." App. 14a-15a n.12.

This Court, however, has (1) "consistently distinguished disparate-treatment cases from cases involving ... disparate impact ...," *United States Postal Service v. Aikens*, 460 U.S. 711, 713 n.1 (1983), (2) repeatedly emphasized that a disparate treatment claim turns on actual discriminatory intent, *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), (3) reiterated that discriminatory intent means "actual motive" and "is not a legal presumption to be drawn from a factual showing of something less than actual motive," *Pullman-Standard*, 456 U.S. at 290, and (4) determined that a finding in a disparate treatment case that some nondiscriminatory policy actually motivated an employment practice precludes liability, *N.Y. City Transit Authority v. Beazer*, 440 U.S. 568, 579, 587 (1979). Just last Term the Court vacated another decision of the court below because of its refusal to interpret properly the intent requirement, and pointedly reminded that court that the critical factual inquiry in any disparate treatment case "is whether the defendant intentionally discriminated" against the plaintiffs by "treating some people less favorably than others because of their ... sex ...." *Aikens*, 460 U.S. at 715.

Here, the trial judge found that Northwest did not pay different wages to its employees because of their sex, but because it actually believed, on the basis of assessments by personnel officials and labor relations counsel, that, as supervisors who were principally assigned to international flights, they were performing different jobs. App. 220a-221a. Indeed, throughout virtually all of the period when pursers were receiving higher pay, Northwest was paying other

male cabin attendants exactly the same wages as it paid to stewardesses for performing what it believed to be the same work. If the purser wage differential was not *actually motivated* by sex discrimination, it is beside the point that the pay scale had a different impact on men and women because most basic cabin attendants were women and most (or all) pursers were men, even if that result was "foreseeable." *See Personnel Administrator v. Feeney*, 442 U.S. 256, 278 (1979).

The court of appeals erroneously took the intent involved in Northwest's pre-1970 *promotional* policy and imputed it to the distinct "equal-pay-for-equal-work" claim. The extravagant result of this confusion is that, instead of awarding backpay to the 100 or so women whose senority would have entitled them to promotion to purser, the courts below effectively "promoted" all 3,300 class members to the purser position by awarding all of them full retroactive pay at the purser level. In the face of factual findings concerning the actual reasons for creating and maintaining the pay differential, however, that approach impermissibly treated the "basis" for the differential as "a legal presumption" which the courts should not have "drawn from a factual showing of something less than actual motive." *Pullman-Standard*, 456 U.S. at 296.[4] The court below has muddled the standards governing cases under two important federal statutes.

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[4] The issue in *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983), and *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), on which the court below relied, was whether there is a Title VII violation when an employer explicitly bases a wage differential on sex but the sex-based decision does not reflect any specific "animus" toward women. The Court there held that, where there *is* a deliberate intent to *base* a differential on sex, nothing further need be shown. Here, by contrast, as the trial judge found, sex was not the employer's reason for distinguishing the pay levels negotiated for the two jobs.

II. MEASURE OF BACKPAY UNDER TITLE VII

The courts below ordered Northwest to pay each member of the Title VII class (which includes more than 2000 stewardesses who are not eligible to recover under the Equal Pay Act) the full difference between what she actually earned as a stewardess and what she would have earned if she had been paid as a purser. Neither court, however, considered it relevant to ascertain what stewardesses would have earned if there had been no separation of cabin attendants into two classifications. Instead, they believed they were *required* to apply the "upward equalization" formula set forth in the Equal Pay Act, 29 U.S.C. § 206(d), in fashioning a backpay remedy under Title VII:

> "'Equalization upward' to the rate of pay for males is the remedy prescribed in the Equal Pay Act, and is the remedy under Title VII as well . . . where the statutes overlap." App. 248a; *see also* App. 239a; 133a; 30a-33a.

This Court, however, repeatedly has emphasized that backpay under Title VII is an equitable remedy and that, in fashioning relief under Title VII, courts must undertake to make the victims of discrimination "whole," but not more than whole. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Courts must "recreate the conditions and relationships that would have been had there been no unlawful discrimination," *Teamsters*, 431 U.S. at 372, and may not "catapult [plaintiffs] into a better position than they would have enjoyed in the absence of discrimination," *Ford Motor Co. v. EEOC*, 458 U.S. 219, 234 (1982). Contrary to the rulings below, this Court already has treated these principles as applying with full force to an equal pay claim brought under Title VII. In *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), a Title VII case involving an equal pay violation, the lower courts had awarded backpay in the full amount of a differential in pension contributions required from men and women, so that the take-home pay of the

women would be retroactively "equalized upward" to the level received by men. This Court held that no backpay award at all was equitably proper, but added—in what the court below here deprecated as mere "guardedly worded *dicta*" (App. 32a):

> "[T]he [lower] court's decision to award the full difference between the contributions made by male employees and those made by female employees . . . may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan." 435 U.S. at 719 n.36.

The decision below conflicts with this principle. As a result, Northwest must pay to the vast majority of its cabin attendants (but not to male basic cabin attendants) the premium paid to its small group of pursers in the belief that the jobs were different and merited different compensation. Northwest's evidence, however, which plaintiffs did not rebut, showed that if Northwest had understood that the jobs were legally "equal," there would have been a combined job classification and a single wage scale in line with the wages paid by other major airlines that had only a single class of cabin attendants, all of which paid wages below Northwest's purser pay level.

Other courts have recognized that automatic "equalization upward" is not necessarily the proper remedy in an equal pay case under Title VII. For example, in *Love v. Pullman Co.*, 569 F.2d 1074 (10th Cir. 1978), a Title VII case involving the payment of unequal wages to employees in all-black and all-white job classifications performing "essentially" the same work, the court declined to award

the full difference between the actual earnings of the two classifications, and instead based backpay on the "average wage" that would have been paid "[h]ad the two job classifications . . . been combined . . ." 569 F.2d at 1076-77. The court held that its approach—which closely parallels the approach proposed by Northwest in this case—was the proper way to "restore those discriminated against to a position as nearly as is now possible to that they would have attained had there been no discrimination." *Id.* at 1076.[5]

In adopting a different approach, the courts below simply engrafted the Equal Pay Act's backpay formula onto the equitable backpay remedy created in Title VII, even though there is nothing in either the language or the legislative history of Title VII suggesting that Congress intended that result. Indeed, this Court has recognized that the two statutes provide different remedial schemes and has noted specifically that the Equal Pay Act affords plaintiffs advantages not available under Title VII, such as entitlement to *enhanced* backpay relief. *See Gunther*, 452 U.S. at 175 n.14. If Congress had chosen to make the Equal Pay Act formula govern the Title VII remedy in "equal pay" cases involving alleged sex discrimination, it could have incorporated the "upward equalization" provision into Title VII. Instead, in adopting the Bennett Amendment, Congress decided only to incorporate the substantive defenses of the Equal Pay Act, but not its backpay formula.

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[5] In addition to *Love*, a number of other courts have upheld the use of "averaging" techniques and similar formulae as the most equitably sensitive way to fashion Title VII backpay. *See, e.g., Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807 (2d Cir.), *cert. denied*, 104 S. Ct. 346 (1983); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 400-01 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1056 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251, 1264-65 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977).

This Court should decide, therefore, whether the decision below misconceives the proper standards for fashioning backpay awards for wage discrimination claims under Title VII.

III. PROPER TEST FOR "WILLFUL VIOLATION"

The Fair Labor Standards Act, of which the Equal Pay Act is a part, generally limits the backpay recovery period to two years before commencement of the suit. Congress provided, however, that backpay may be recovered for three years if there was a "willful violation." 29 U.S.C. § 255(a). The court below held that an employer commits a "willful violation" simply when he is "cognizant of an appreciable possibility that he may be subject" to the Act and deliberately pursues a course "which turns out to be wrong." App. 122a-123a. Under this standard, not even negligence is necessary to establish a "willful violation."

A. The circuits have adopted different interpretations of the "willful violation" standard. As the court below recognized, "[c]ourts ... have usually subscribed to one or the other of two divergent views," with some "requiring nothing more than knowledge of the possible applicability of the governing statute to the conduct eventually held to be legally wanting," and others requiring that "violations of the Act be deliberate, voluntary and intentional." App. 115a-116a (comparing cases) (footnotes omitted). The court below nevertheless declined to follow either of those standards and instead adopted still a third approach. App. 121a-123a.[6]

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[6] The statutory language indicates that recovery for three years was intended to be the exception, not the rule, and to be available only when the employer intended to violate the law. *See* 29 U.S.C. § 255(a) (recovery limited to two years "except" in a case "arising out of a willful violation"). But it is only the rarest of employers who is not cognizant of at least the existence of the FLSA. The standard adopted by the court below, therefore, automatically subjects virtually all employers to an

(footnote continued on next page)

Certiorari should be granted to resolve this confusion among the circuits. The issue is an important one affecting the administration of the FLSA. Over the last several years, about 1,500 cases under the FLSA have been filed each year in federal court. *Annual Reports of the Director of the Administrative Office of the United States Courts* (1978-1983). The permissible length of the backpay recovery period in these cases turns on the interpretation of the "willful violation" provision of the FLSA.

B. A closely related question is before the Court in *TWA v. Thurston*, No. 83-997, which was argued on October 9, 1984. That case involves the proper standard for determining when there has been a "willful violation" of the Age Discrimination in Employment Act, a finding that permits the award of double damages, 29 U.S.C. § 626(b). There is a related circuit conflict over that interpretation. *Compare Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020, n.27 (1st Cir. 1979), *with Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980). The Age Discrimination Act, however, also incorporates from the FLSA the same "willful violation"

(footnote 6 continued)

extra year of liability. Indeed, a recent survey of decisions interpreting § 255 discovered that courts which have adopted a standard similar to the one adopted below have found violations "willful" in all but one case. Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 78 Mich. L. Rev. 626, 632 (1980).

The extreme to which some courts have gone in imposing the supposedly "exceptional" extra year of liability is illustrated by decisions in the Fifth Circuit. *Compare Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972) (counsel's advice that employer was in compliance demonstrated awareness of Act and, hence, willfulness) *with Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974) (employer's decision not to seek legal counsel not a defense to liability for a willful violation). The Fifth Circuit's seminal *Jiffy June* decision acknowledged that every prior decision construing § 255 had awarded an extra year of backpay only upon a showing that the employer consciously violated the law. Recently, two judges in the Fifth Circuit expressly acknowledged that *Jiffy June* was wrongly decided. *Hill v. J. C. Penny Co.*, 688 F.2d 370, 376 (5th Cir. 1982) (concurring opinion of Gee & Clark, JJ.)

provision at issue in this case to govern the backpay recovery period in age discrimination cases. *See* 29 U.S.C. § 626(e)(1). As the Solicitor General noted in the EEOC's brief in *Thurston* (at 33), there is a "strong presumption that Congress intended that the term" have the same meaning in both contexts. *See Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). Thus, it is likely that this Court's interpretation of the double-damage standard under the Age Discrimination Act also will govern the standard fixing the backpay recovery period, which both the Age Discrimination Act and the Equal Pay Act borrow from the FLSA.

Therefore, the Court should not attempt to resolve the issue under the Age Discrimination Act in *Thurston* without also considering the meaning of the same language in the FLSA. The legislative history of the 1966 amendment to the FLSA, which added the "willful violation" provision at issue here, is necessary to an understanding of Congress' intent in both adopting and incorporating the "willful violation" standard in the Age Discrimination Act the following year. *See, e.g., Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 753-756 (1979). At oral argument in *Thurston*, counsel for the government argued that the legislative purpose underlying the FLSA's "willfulness" provision should be controlling in construing the same phrase in the Age Discrimination Act. Yet, none of the briefs submitted in *Thurston* even alludes to the relevance of the legislative history of that 1966 amendment to the FLSA. As the first comprehensive study of the extensive legislative history relating to the 1966 "willfulness" amendment demonstrates, Congress intended that a "violation" would be "willful" only if the employer consciously disregarded the requirements of the law. *See* Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 78 Mich. L. Rev. 626 (1980).

Moreover, the parties in *Thurston* briefed only how different interpretations of the standard for double damages under the Age Discrimination Act could influence enforcement of that Act. But identical language in the FLSA governs the backpay period under the FLSA, the Equal Pay Act, and the Age Discrimination Act. Since the Court's decision in *Thurston* will affect the enforcement of those other statutes, the Court should have before it full briefing on the policies of those other provisions when it construes the "willful violation" language in § 626(b) of the Age Discrimination Act.[7]

C. The standard for a "willful violation" adopted by the court below is inconsistent with either standard proposed by the parties in *Thurston*. Although TWA in that case is arguing that a violation is "willful" only if the employer specifically intends to violate the Act, the Solicitor General is proposing that a violation should be treated as "willful" "whenever the employer intentionally discriminates on the basis of age and is, or should have been, aware of the applicability of the ADEA" to his conduct. EEOC Br. at 36. The test applied by the court below under the Equal Pay Act, however, is even more expansive than that proposed by the Solicitor General, because the court below expressly dispensed with any need to find that Northwest "intentionally discriminated on the basis of" sex in paying the differential. Either outcome in *Thurston*, therefore, will establish that the court below erred in adopting a standard under which intent to discriminate on the basis of sex is treated as

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[7] Moreover, under the Age Discrimination Act the "willful violation" standard governs both the backpay period and the availability of double damages, but under the FLSA the availability of double damages turns on whether the employer acted in "good faith" and with "reasonable grounds" for believing the employment practice was lawful. The relationship between these apparently distinct standards is important in arriving at a sound construction of "willful violation" that preserves the coherence of this interrelated statutory scheme, but the parties do not address this problem in *Thurston*.

irrelevant in determining whether any "violation" was "willful." Thus, the judgment below, at a minimum, will have to be vacated to the extent that it rests on a different standard of "willfulness."

IV. STANDARDS FOR "LIQUIDATED DAMAGES"

Under the Fair Labor Standards Act, which includes the Equal Pay Act, a plaintiff who establishes liability may recover not only backpay but also "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The statute further provides, however, that the trial judge may decline to award double damages if the employer acted "in good faith" and with "reasonable grounds" for believing that his actions were lawful. 29 U.S.C. § 260.

In *Laffey I*, the court of appeals reversed the trial judge and ruled that "traditional practice of the Company," "general industry practice to the same effect," "the acquiescence of the stewardess' bargaining representative in this arrangement," and "the absence of any grievances or even suggestions from stewardesses to the contrary" are legally irrelevant in determining whether Northwest had "reasonable grounds" for its belief that the pay differential between pursers and stewardesses was permissible under the Act. App. 127a. On remand the district judge read *Laffey I* as holding that those four factors also could not be considered "to support the finding of good faith." App. 252a. In *Laffey III*, the court of appeals upheld this broad reading of *Laffey I*. App. 46a. The holding of the court below that those four factors are not legally relevant to either an employer's good faith or the reasonableness of his belief is in conflict with other decisions and is inconsistent with the express terms of the FLSA.

Many other courts have concluded that an employer had a reasonable, good faith belief in the lawfulness of an

employment practice based on (1) the employer's traditional practice, *see, e.g., EEOC v. Kendon of Dallas, Inc.*, 34 EPD ¶ 34,393 at 33,398 (E.D. Tex. 1984); *Conwell v. Central Mo. Telephone Co.*, 76 F. Supp. 398, 406 (W.D. Mo.), *aff'd*, 170 F.2d 641 (8th Cir. 1948); (2) industry custom, *see, e.g., Kimball v. Goodyear Tire & Rubber Co.*, 504 F. Supp. 544, 549 (E.D. Tex. 1980); *Bailey v. Pilots' Ass'n*, 406 F. Supp. 1302, 1308 (E.D. Pa. 1976); or (3) a collective bargaining agreement, *see, e.g. Addison v. Huron Stevedoring Corp.*, 96 F. Supp. 142, 167 (S.D.N.Y. 1950), *aff'd on this point but rev'd in part on other grounds*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953); *Ahearn v. Holmes Electric Protective Co.*, 110 F. Supp. 822, 827 (S.D.N.Y. 1953). So far as we are aware, no other court has ruled that these factors must be categorically excluded in applying § 260. *See generally* 26 A.L.R. Fed. 648-54 (1976 & 1984 Supp).[8]

It is not surprising that other courts have often relied on the four factors held irrelevant below. Congress adopted § 260 as one of the 1947 portal-to-portal amendments to the FLSA in order to eliminate the harshness of a liquidated damages provision that had been construed as mandatory even when the employer had made a *bona fide* mistake. The congressional findings and declaration of policy, which are set forth in the statute itself, provide that the purpose of the amendments was to avoid "wholly unexpected liabilities, immense in amount and retroactive in operation" resulting from judicial decisions overriding "long-established *customs, practices,* and *contracts* between employers and employees." 29 U.S.C. §251(a) (emphasis added). In addition, the amendments were specifically designed to "protect

[8] Courts have adopted varying positions on the relevance of employee acquiescence in the challenged wage practice. *Compare Landaas v. Canister Co.*, 188 F.2d 768, 772 (3d Cir. 1951) (absence of employee complaints relevant), *with Martinez v. Food City, Inc.* 658 F.2d 369, 376 (5th Cir. 1981) (absence of employee complaints irrelevant, citing *Laffey I*).

the right of collective bargaining." 29 U.S.C. § 251(b)(2). Yet, the court below held that the trial judge erred as a matter of law in even considering these very factors.[9]

The court of appeals' single-minded focus on "legal uncertainty" frustrates the broader, stated purposes of the ameliorative amendment and establishes a standard that would be virtually impossible for any employer to satisfy. Entitlement to liquidated damages is a question that arises in every one of the thousands of cases filed under the FLSA, but this Court has never addressed the standards set out in § 260 by which an employer may be relieved of liability for the additional damages. The Court should grant certiorari to make the interpretation of § 260 in the District of Columbia Circuit consistent with the interpretations followed in the other circuits and with the express language of the Fair Labor Standards Act.

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[9] After remand, the district judge ruled that, without being able to rely on the four excluded factors as bearing on Northwest's "good faith," the Company could not show that it had done enough to demonstrate "good faith" legal uncertainty. The court rested on Northwest's failure to commission a formal job evaluation and its reliance on legal advice from in-house (as opposed to outside) counsel. App. 253a. But Congress specifically decided that an employer should not be required to conduct a job evaluation to establish that two jobs are different, 109 Cong. Rec. 9198, 9203 (1963) (remarks of Rep. Goodell and Rep. Griffin), and hardly could have intended to subject an employer to double damages whenever a formal evaluation was not performed. Moreover, other courts have held that advice of outside counsel is not a prerequisite to good faith. *See, e.g., Van Dyke v. Bluefield Gas Co.*, 210 F.2d 620, 622 (4th Cir.), *cert. denied*, 347 U.S. 1014 (1954); *see also General Electric Co. v. Porter*, 208 F.2d 805, 817 (9th Cir. 1953), *cert. denied*, 347 U.S. 951 (1954); *cf. Lave v. M'S Pub, Inc.* 435 F. Supp. 917 (D. Neb. 1977) (employer's reliance on accountant's advice sufficient to demonstrate good faith).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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